86-860

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALTER T. WALKER, III, INDIVIDUALLY AND AS CLASS REPRESENTATIVE,
Petitioner,

v.

ACTION INDUSTRIES, INC., AMOS COMAY, ERNEST BEREZ, AND SHOLOM COMAY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals erred in holding that Action Industries, Inc. and its controlling insiders owed no duty in an issuer tender offer to disclose to minority shareholders material information consisting of substantial increases in firm sales orders and projections of substantial increases in income, thus conflicting with *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), and with disclosure rules dealing with projections and soft information adopted by other circuits.

2. Whether the Court of Appeals erred in affirming the trial court's ruling striking from evidence in a fraud-on-the-market case the July 16, 1982, Tender Offer Statement, thus depriving the jury of an opportunity to weigh the "total mix" of information available to the market.

3. Whether the Court of Appeals erred in affirming the trial court's denial for lack of typicality a motion for certification of a class consisting of Action Industries minority shareholders who sold Action stock on the American Stock Exchange during the period from the issuance of the July 16, 1982, Tender Offer Statement through the October 29, 1982, release of Action's first quarter results.

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Walter T. Walker, III, individually and as class representative, petitions for a writ of certiorari to reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unofficially reported in Fed.Sec.L. Rep. (CCH) ¶ 93,943 and is officially reported at 802 F.2d 703 (1986). Appendix ("App."), *infra*, 1a-19a. Rulings of the United States District Court for the Eastern District of Virginia are set forth in App., *infra*, 20a, 21a, 22a-23a.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Fourth Circuit Court of Appeals was entered on October 1, 1986. Petitioner invoked the jurisdiction of the U.S. District Court pursuant to 28 U.S.C. § 1331.

STATUTES AND RULES INVOLVED

The statutes and rules involved in this proceeding are Section 10(b) and Section 13(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and § 78m(e); Rule 10b-5, 17 C.F.R. § 240.10b-5; Rule 13e-4, 17 C.F.R. § 240.13e-4; and Rule 23, Fed.R.Civ.P. App., *infra*, 24a-28a.

STATEMENT OF CASE

A. Action Industries, Inc. Tender Offer

This litigation arises out of an issuer tender offer initiated on July 16, 1982, by Action Industries, Inc. ("Action"), a Pennsylvania corporation listed on the American Stock Exchange. As a result of the July 16 tender offer, Action purchased from minority shareholders 237,091 shares of common stock at $4.00 per share, representing approximately 14 percent of the 1,696,005 shares outstanding.

The tender offer was instituted, designed and carried out by three inside Action directors, Amos Comay, Ernest Berez and Sholom Comay, who were also principal officers of the company. These three directors together owned or controlled 563,441 shares of Action stock, representing 33⅓ percent of shares then outstanding.

The $4.00 share price, which Action affirmatively represented in the Tender Offer Statement to be a "premium" over market price, was set by the three inside directors. Joint Appendix at 3005. Through the tender offer, these three insiders substantially increased their percentage of ownership of Action. Also, within a year the value of their Action stock increased by many millions of dollars as the market price of the stock rose as high as $45.00 per share before a three-for-one stock split in July 1983. The stock purchased by Action was later used for various corporate purposes, including a convertible debenture offering in March 1983 and corporate acquisitions later in 1983.

B. Tender Offer Statement

Respondents first discussed the tender offer in May 1982. As the chief financial and operating officers of Action, respondents were well aware in May 1982 that Action was planning ". . . substantial increases in actual orders and projected sales for the first quarter of fiscal 1983 over the same period for fiscal 1982." App., *infra,* 4a.

The only audited financial information set forth in the Tender Offer Statement was for fiscal years 1979, 1980 and 1981. "These figures revealed a net loss of $2,306,900 in fiscal 1979, net earnings of $372,900 in fiscal 1980, and net earnings of $731,200 in fiscal 1981." App., *infra,* 3a.

Action included unaudited, interim financial statements for fiscal 1982 through March 27, 1982, the end of Action's third fiscal quarter. These figures indicated a substantial net loss of $4,014,900 as compared with net earnings of $1,037,600 for the same period in the previous year. App., *infra,* 3a.

The only information in the Tender Offer Statement that could be construed as describing the current business outlook for Action—information of critical interest to market investors and minority shareholders—was a brief narrative in paragraph 14B:

> B. *Events Subsequent to March 27, 1982.* The Company's fiscal year ended on June 26, 1982. Although financial statements have not yet been prepared or audited, the Company expects results from continuing operations to reflect a sales increase compared with the prior year. However, earnings from continuing operations are estimated to be somewhat lower than last year as a result of lower gross margins on sales and higher operating expenses. The Company expects that the net earnings of Action Tungsram, Inc., in which it owns a 41% interest, will be substantially higher than last year . . .

App., *infra,* 3a-4a.

Thus, respondents included in the Tender Offer Statement their internal projections of negative operating results, *i.e.*, that although Action expected a sales increase, "earnings from continuing operations [were] estimated to be somewhat lower than last year as a result of lower gross margins on sales and higher operating expenses." But respondents deliberately omitted from the Tender Offer Statement any mention of their internal projections showing a substantial increase in firm contracts for sales by the Dollar-Ama division, Action's major source of income.

C. Undisclosed Material Information in Action's Records

Action is a housewares marketing corporation in the business of selling turn-key, pre-packaged promotional programs primarily to large regional and national discount chain stores. These sales require long-term planning and firm contractual commitments many months in advance of sale dates.

In order to conduct its pre-packaged Dollar-Ama sales, Action must have firm advance commitments from the large retail chains.[1] Conversely, the large chains must make such firm advance commitments to enable store-

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[1] Action purchases a large percentage of promotional sale items in foreign countries. Advance shipping time is required for sale items to be available as advertised. Action contracts to design, print and distribute large numbers of newspaper advertising supplements which must arrive at local newspapers in advance of area-wide promotional sales. The multiple sales items must be separated from Action's warehouse inventory and separately packaged for delivery to individual stores in different cities. Arrangements have to be made for transportation of merchandise to separate store sites. Action manufactures many plastic household items for its promotional sales. In order to accommodate increased sales, Action is required to plan in advance for raw material needs and production schedules. To accommodate the substantial increase in firm sales which were under contract, Action hired large numbers of new employees.

wide planning for the promotional sales. Action maintains separate customer files. These files contain written confirmation of contracts between Action and individual retail customers.

Action regularly prepares and uses internal records for planning. These records, entitled Weekly Work Projections, Dollar-Ama Gross Sales Forecasts, and Flash Sales Reports, demonstrate that respondents, by virtue of their positions as insiders, knew beyond cavil on July 16 of the substantial increase in firm sales orders. They also knew with a high degree of certainty that Action's first quarter Dollar-Ama sales revenues were going to increase by a substantial percentage.

Action's Weekly Work Projections, which are updated weekly, are detailed business records used throughout Action to plan and coordinate Dollar-Ama sales booked for current and ensuing quarters. These multiple-page documents contain columns setting forth customer names, dates on which sales will be advertised, sale budgets, number of stores to which shipments will be made, and value of goods shipped in the prior quarter. Action also states on these documents whether sales are "firm" or "anticipated." App., *infra*, 4a.

Action regularly summarizes total projected sales orders in its Dollar-Ama Gross Sales Forecasts. These forecasts showed total Dollar-Ama sales "firm" orders at the time of the tender offer. App., *infra*, 4a. Action knows its gross profit margin at the time it agrees to a firm sales contract. Joint Appendix at 537, 628.

As of July 16, 1982, Action's internal business documents show that Action had booked $19.6 million of "firm" Dollar-Ama sales for the first quarter of fiscal year 1983 ending September 26, 1982, as compared to only $9.4 million at the same time in the first quarter of the prior year. Joint Appendix at 3157. The documents also show a substantial increase in firm orders for the

second quarter. Joint Appendix at 2382-2383, 3157, 3537-3547. Respondents' first public disclosure of the substantial sales increase occurred on October 29, 1982, when they revealed that the Dollar-Ama sales for the first quarter increased 104 percent resulting in a *tenfold* increase in net earnings per share.

D. Petitioner's Sale of Action Stock

Petitioner Walter T. Walker, III owned 2,000 shares of Action stock when news of the tender offer was disseminated to the public media on July 16, 1982. Petitioner purchased an additional 1,500 shares of Action stock on the open market at $4.00 per share on July 21, 1982. App., *infra,* 4a. Petitioner subsequently received and read the multi-paged Tender Offer Statement which he found to be negative with respect to the outlook for Action's continuing operations. App., *infra,* 4a; Joint Appendix at 449-450.

Petitioner subsequently learned of a two page press release from Action dated August 18, 1982, which summarized audited results for the fiscal year ending June 26, 1982. The press release information did nothing to correct the lackluster financial picture set forth in the Tender Offer Statement. On September 21, 1982, petitioner sold his 3,500 shares of Action stock at $5.25 per share. App., *infra,* 5a.

Petitioner subsequently brought an individual and class action law suit in the United States District Court, Eastern District of Virginia, on behalf of all Action minority shareholders who sold their stock on the American Stock Exchange between July 16, 1982, and October 29, 1982. The suit alleged that respondents made material omissions and misrepresentations in the July 16 Tender Offer Statement, thus committing fraud on the public securities market. As a result of the fraud, petitioner and other class members were injured when they sold their stock at artificially depressed prices.

Petitioner sought damages representing the difference between the $5.25 per share he received on the public market and $15.75, the price at which Action stock traded on November 12, 1982, following market absorption of partial disclosure of material information omitted from the Tender Offer Statement.[2] App., *infra*, 6a.

By early September 1982, prior to the time petitioner sold his 3,500 shares, the substantial increase in sales revenues and earnings for the first quarter was not even arguably in doubt. Yet respondents remained silent in order to conceal their omissions in the Tender Offer Statement, thus allowing innocent minority shareholders to sell their stock at market prices reflecting the false and misleading information disseminated in the tender offer.

E. Rulings Below

The trial court properly instructed the jury that respondents owed "a continuing duty to correct any previously made public misrepresentation or misleading statement of material fact." App., *infra*, 23a. The district court then cancelled this instruction by instructing the jury immediately thereafter that respondents owed no duty to disclose the substantial increase in firm Dollar-Ama sales orders or any financial projections based upon such projected increases in revenue: "*There is no duty on a corporation to disclose future projections. However, it can do so voluntarily.*" App., *infra*, 23a. The Court of Appeals affirmed this instruction. App., *infra*, 8a, 15a.

The Court of Appeals also affirmed the trial court's ruling striking the Tender Offer Statement from evidence. The trial court ruled that the tender offer omissions and misrepresentations did not as a matter of law

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[2] A total of 340,300 shares of Action stock were sold on the American Stock Exchange from July 16, 1982, through October 29, 1982, at an average price of approximately $6.40 per share. Joint Appendix at 3139-3142.

continue to affect the market price of Action stock after the tender offer expired on August 6, 1982. App., *infra,* 6a n.5, 22a-23a.

The Court of Appeals affirmed the trial court's ruling denying petitioner's motion for class certification and motion for reconsideration of order denying class certification.[3] App., *infra,* 18a.

REASONS FOR GRANTING THE PETITION

I. THE RULE ADOPTED BY THE FOURTH CIRCUIT CREATES A FUNDAMENTAL CONFUSING EXCEPTION TO SECURITIES LAWS DISCLOSURE REQUIREMENTS WHICH WILL ENCOURAGE SECURITIES FRAUD.

There is an immediate and urgent need for the Supreme Court to clarify securities laws disclosure standards with respect to material information based upon future projections and soft information. The Fourth Circuit's acceptance of less than full and fair disclosure is based upon purported current confusion in SEC disclosure requirements. Failure of this Court to resolve this issue will inevitably result in a multitude of new lawsuits by investors against corporations uncertain of the standard of disclosure. Lower courts will be burdened in attempting to resolve the open conflict between the circuits. These admittedly complex issues have circulated for many years in the lower courts and are now ripe for resolution by the Supreme Court.

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[3] The Court of Appeals reversed the trial court's ruling that respondents owed no fiduciary duty to petitioner under Pennsylvania state law, but still affirmed the trial court's directed verdict with respect to petitioner's claims under Pennsylvania state law for breach of fiduciary duty and punitive damages. App., *infra,* 18a. This ruling is erroneous since the appellate court impermissibly intruded on the factfinding prerogatives of the lower court. *U.S. Postal Service Board of Governors* v. *Aikens,* 460 U.S. 711 (1983).

The *per se* rule adopted by the Fourth Circuit that corporations and controlling insiders trading in their own stock have no duty as a matter of law to disclose material information, if such information is arguably based upon future projections or soft information, is contrary to the disclosure requirements of the federal securities laws.[4] The Fourth Circuit's limitation on the duty to disclose undermines the broad policy of Rule 10b-5 and Rule 13e-4 requiring full disclosure of all material information. *Schreiber v. Burlington Northern, Inc.*, —— U.S. ——, 105 S.Ct. 2458, 2462 (1985). Under the Fourth Circuit's analysis, corporate insiders will be able to use undisclosed material information to defraud innocent investors, thereby jeopardizing the integrity of the stock market. If the public believes the markets are manipulated by persons with inside information, American businesses will be unable to raise investment dollars.

A. Standard of Materiality

The rule adopted by the Fourth Circuit is in conflict with the standard for determining materiality set forth

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[4] Respondents' tender offer was made subject to long-established requirements of Rule 10b-5, Rule 13e-4(b), and Schedule 13E-4, 17 C.F.R. § 240.13e-101.

Rule 10b-5, first promulgated in 1942, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

Rule 13e-4(b) imposes similar duties in connection with an issuer tender offer. App., *infra*, 27a.

in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), and rules governing disclosure of soft information adopted by the First, Second, Third, Sixth and Ninth Circuits.

TSC Industries holds:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding [whether to sell his shares]. It does not require proof of a substantial likelihood that disclosures of the omitted fact would have caused the reasonable investor to change his [decision]. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.

426 U.S. at 449.

The Supreme Court has not expressly considered the application of this materiality standard to soft information.[5] The SEC recently stated to this Court in *Radol v. Thomas*, No. 85-1030, that: "The question under what circumstances the anti-fraud provisions of the federal securities laws may require the disclosure of 'soft information' (such as asset appraisals based on projections) is an important one. . . ." Brief for the United States as Amicus Curiae at 8. Petitioner's case clearly raises this important issue.

The holding of the Fourth Circuit that the federal securities laws never require disclosure of projections conflicts with long-established disclosure requirements of the Securities and Exchange Commission. The proper test for materiality is that enunciated in *SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 849 (2d Cir. 1968) *(en banc)*

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[5] "Soft information" refers to a variety of statements concerning the future, such as projections, forecasts, predictions, and statements concerning plans and expectations. Schneider, *Nits, Grits and Soft Information in SEC Filings*, 121 U.Pa.L.Rev. 254, 255 (1972).

(material facts also include "facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell or hold the company's securities."), *cert. denied,* 404 U.S. 1005 (1971). The First Circuit has adopted this view. *SEC v. MacDonald,* 699 F.2d 47, 50 (1st Cir. 1983).

Materiality will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company's activity. *Sonesta Int'l Hotels Corp. v. Wellington Associates,* 483 F.2d 247, 251 (2d Cir. 1973). "Where the event, if it should occur, could influence the stockholder's decision to tender, the chance that it might well occur is a factor that should be disclosed to the investor for consideration in making his or her decision." *Id.* at 251; *SEC v. MacDonald,* 699 F.2d at 50 (probability of future event was sufficiently large to remain material even discounting for whatever uncertainty may be thought to have existed).

Application of the *TSC Industries* standard of reasonableness is a question of fact to be resolved by the jury. Materiality must be determined "on a case-to-case basis according to the fact pattern of each specific transaction." *SEC* v. *Shapiro,* 494 F.2d 1301, 1306 (2d Cir. 1974). "Only if the alleged misrepresentations or omissions are so clearly unimportant to an investment decision that reasonable minds cannot differ should the issue of materiality be resolved as a matter of law . . ." *Berg v. First American Bankshares, Inc.,* 796 F.2d 489, 495 (D.C. Cir. 1986); *Goldman v. Belden,* 754 F.2d 1059, 1068 (2d Cir. 1985).

In sum, the Fourth Circuit improperly decided as a matter of law the critical factual issue of whether the undisclosed soft information was material. *TSC Industries,* 426 U.S. at 450. No matter how significant reasonable investors may have considered Action's projections

of substantially increased firm sales contracts and revenues, the Fourth Circuit opinion holds that corporate issuers are not required to disclose such information even if there is a substantial likelihood that a reasonable investor would rely on such information.

B. Rule and Rationale of the Fourth Circuit

The opinion of the Fourth Circuit recognizes that at the time of the issuance of the tender offer, Action's internal Weekly Work Projections and Dollar-Ama Gross Sales Forecasts were projecting substantial increases in Dollar-Ama sales revenues. "On July 15 they indicated a 109% increase . . ." App., *infra*, 14a. These internal projections were highly accurate. Action disclosed in its first quarter report dated November 10, 1982, that promotional sales revenues for the first quarter of 1983, in fact, increased by 104 percent compared to the prior year. Joint Appendix at 3069.

The court, however, found itself "reluctant to recognize a duty" to disclose the information because the "projections were changing constantly," thus creating a "potential to mislead investors." App., *infra*, 14a. This underlying rationale of the Fourth Circuit does not withstand close scrutiny. The fact that the Gross Sales Forecasts consistently increased from May 20, 1982, when respondents first contemplated the tender offer through the July 16, 1982, tender offer period is simply dramatic confirmation that respondents knew with a great deal of certainty on July 16 that Action's sales would substantially increase during the first quarter then in progress.

There was never any change in the May 20 favorable outlook; it was strengthened and confirmed up to and including July 16 when it accurately showed a doubling of sales. At no point after the commencement of the tender offer did Action's projections show less than a *doubling*

of Dollar-Ama sales over the same quarter in the prior year.[6] Joint Appendix at 3157-3160, 3357-3391.

The United States Court of Appeals for the Third Circuit faced with a similar set of facts where defendants had hard information on substantially increased "orders" but only "predictions" on increased earnings rejected the position adopted by the Fourth Circuit that such information need not be disclosed. *Rothberg v. Rosenbloom*, 771 F.2d 818 (1985). The Third Circuit held:

> Unquestionably a factfinder could draw the reasonable inference that a reasonable investor would see the obvious connection between increased revenues and the likelihood of increased profits. The [trial court's] finding that a reasonable investor would consider the sales information to be "objective, valuable, material knowledge of how much Mallory Randall would earn in the year in question" is not clearly erroneous.
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> * * * *
>
> Thus we hold that the trial court did not err, factually or legally, when it found that the Carolina Toy 1969 sales information was material, and that the insiders should not have used it to the disadvantage of sellers in the market who were unaware of it.

Id. at 821.

The Fourth Circuit's flawed attempt to distinguish the Third Circuit's holding in *Rothberg* serves a useful analytical purpose. App., *infra*, 16a. Courts analyzing the issue of duty to disclose material information based in part upon projections or soft information have traditionally been influenced both by the type of information

[6] The Court of Appeals noted in its opinion that Action's Flash Sales Reports comparing quarter-to-quarter increases varied from week to week. App., *infra*, 14a. Action's Flash Sales Reports, however, report actual shipments which, not surprisingly, vary from week to week depending upon the dates of seasonal promotional programs. Joint Appendix at 3166-3177.

involved and by the status of the parties issuing or withholding such information. The relationship of the parties and the type of information in *Rothberg* and in this case are virtually identical. Insiders in both cases benefited from nondisclosure of a substantial increase in firm sales orders. The Third Circuit, as contrasted with the Fourth Circuit, characterizes these firm sales contracts as "hard information" which must be disclosed.[7]

The *Walker* Court also attempts to distinguish the Fourth Circuit's prior holding in *Lockspeiser v. Western Maryland Company*, 768 F.2d 558 (1985), in which the district court on remand was instructed to determine if failure to disclose estimates of coal tonnage and board feet of timber reserves was material. App., *infra*, 12a. The court's reasoning in *Walker* that a corporation could be required to disclose estimates of coal and timber reserves but as a matter of law not be required to disclose substantial increases in sales contracts or financial projections is not persuasive. Both types of information are highly material to shareholders since both are revenue generating and hence related to value. The financial projections based upon substantial firm sales contract increases in *Walker* contain less future uncertainty than that arising from estimated coal tonnage and timber reserves in *Lockspeiser*. App., *infra*, 12a.

The Fourth Circuit's opinion fundamentally misperceived the SEC's position on disclosure when the court held that the "SEC has not imposed a duty to disclose" the type of information in question here and that

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[7] Respondents had the internal capability and knowledge to translate such sales information into highly favorable financial projections. They knew with substantial certainty on July 16 the cost of their merchandise, profit margins and other fixed costs. They thus knew with great certainty on July 16 that a substantial increase in Dollar-Ama sales would result in a corresponding substantial increase in net earnings per share.

"[w]e perceive the current SEC regulatory environment to be an experimental stage . . ."[8] App., *infra*, 13a.

In one of the earliest decisions interpreting what is now Rule 10b-5, *Ward La France Truck Corp.*, 13 SEC 373 (1943), the SEC concluded that failure of Ward La France Truck Corporation to disclose the "improved financial and operating conditions," including the "tremendous improvement in earnings," to minority shareholders violated Rule 10b-5. *Id.* at 378-381. The SEC also recognized that controlling shareholders who cause the corporation to purchase minority stock, thus enhancing their own stock position, are indeed acting as insiders. *Id.*[9]

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[8] The Fourth Circuit erroneously believed there is current confusion in the SEC's disclosure requirements. The SEC "has for many years required disclosure of order backlogs and commitments." Sec. Act Rel. No. 5699 [1975-1976 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 80,461 (April 23, 1976) at 86,202 n.3. In 1976, the SEC amended Rule 14a-9, 17 C.F.R. § 240.14a-9, to eliminate predictions of future earnings from the list of examples of what may be misleading in a proxy statement. Sec. Act Rel. No. 5699, *supra*. [Since this change, "liability for nondisclosure of a material projection is much more likely than before." 3 A. Bromberg, *Securities Law Fraud* ¶ 6.5(431)(3) (July 1977 Supp.) at 136.123.]

In 1978, the SEC issued a statement to encourage certain issuers of securities to publish projected financial information. Sec. Act Rel. No. 5992 [1978 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 81,756 (November 7, 1978). With the promulgation in 1979 of Rule 175, 17 C.F.R. § 230.175, creating a safe harbor for good faith release of soft information, a corporation can no longer claim reliance on any SEC rule as a defense for failure to disclose soft information. *See, Flynn v. Bass Brothers Enterprises, Inc.*, 744 F.2d 978, 984 n.5, 986-988 (3rd Cir. 1984) (discussing retroactive application of Rule 175 to a transaction occurring in 1976).

[9] The Fourth Circuit's reliance on *Gerstle v. Gamble-Skogmo*, 478 F.2d 1281 (2d Cir. 1973), is misplaced. Although there was no duty to disclose asset appraisals, the *Gerstle* court, citing *Ward La France Truck Corp.*, recognized that the SEC policy required disclosure of firm offers. *Id.* at 1294-1295.

The long-established view of the SEC on disclosure of such information is set forth in a recent release, *In re Carnation Company*, Exchange Act Rel. No. 22,214 [1984-1985 Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 83,801 (July 8, 1985), at 87,595: [10]

> Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit an issuer from making public statements that are false or that fail to include material facts necessary to make the statements made, in light of the circumstances under which they are made, not misleading. *E.g., Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 860-2 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969); *Schlanger v. Four-Phase Systems, Inc.*, 582 F.Supp. 128 (S.D.N.Y. 1984). This prohibition is triggered whenever the issuer speaks, regardless of whether the issuer is trading in its own securities or is otherwise required to disclose material facts. *See Securities and Exchange Commission v. Texas Gulf Sulphur Co., supra* at 861.

This SEC release recognizes and emphasizes the importance of accurate and complete issuer disclosure to

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[10] The practical unworkability of the Fourth Circuit's rule is demonstrated in the court's treatment of the issue of Action's continuing duty to disclose "actual orders and sales" as contrasted with projections based upon "firm orders." The opinion does not decide the issue of Action's continuing duty to disclose "actual orders and sales" because petitioner did not request an additional instruction. Petitioner, however, sought a trial instruction that respondents owed a continuing duty to disclose all material information. Joint Appendix at 283-284, 293-296.

Further, the trial court never defined projections. Thus, the instruction given by the trial court that respondents owed no duty to disclose "future projections" confused and misled the jury. Actual sales and revenues were still "future projections" in September 1982 because of possible returns of merchandise and advertising adjustments. The duty to disclose cannot rest upon such hairsplitting judgments. App., *infra*, 23a.

the integrity of the securities markets. "To the extent that investors cannot rely upon the accuracy and completeness of issuer statements, they will be less likely to invest, thereby reducing the liquidity of the securities markets to the detriment of investors and issuers alike." *Id.*

C. Conflict with Other Circuits

The Fourth Circuit's rule on the duty to disclose projections is in direct and acknowledged conflict with the rules enunciated by the Courts of Appeals for the Third, Sixth and Ninth Circuits.[11]

The Fourth Circuit recognized that:

> [T]he Third Circuit has held that '[c]ourts should ascertain the duty to disclose asset valuations and other soft information on a case by case basis.' *Flynn v. Bass Brothers Enterprises, Inc.*, 744 F.2d 978, 988 (3d Cir. 1984) (rule 10b-5 and § 14(e) claim for material omissions in tender offer statement).[12]

App., *infra*, 10a-11a.

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[11] Respondents had a duty to disclose all material information or to refrain from trading. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d at 849; *Holmes v. Bateson*, 583 F.2d 542, 558 (1st Cir. 1978) (failure to disclose existence of preliminary merger discussions); *Nelson v. Serwold*, 576 F.2d 1332, 1336 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) (failure to disclose existence of firm plan to sell company).

See also, Levinson v. Basic Industries, Inc., 786 F.2d 741, 746-747 (6th Cir. 1986) (duty to disclose all material information arises because statements voluntarily made denying merger negotiations were misleading), *pet. for cert. filed*, No. 86-279, 55 L.W. 3153 (September 9, 1986). [We note that this Court has invited the Solicitor General to file a brief in *Levinson* expressing the views of the United States, 55 L.W. 3257 (October 14, 1986).]

[12] Whether there is a duty to disclose soft information depends on the following factors: the facts upon which the information is based; the qualifications of those who prepared or compiled it; the purpose for which the information was originally intended; its relevance to the stockholders' impending decision; the degree of

The opinion further recognized that:

> [T]he Sixth Circuit . . . has ruled that there is no duty to disclose financial projections unless they are 'substantially certain.' *See Starkman v. Marathon Oil Company*, 772 F.2d at 241-42 (rule 10b-5 claim for material omissions in press release designed to thwart tender offer) (citations omitted).

App., *infra*, 11a.

Finally, the Court of Appeals stated:

> In *Vaughn v. Teledyne, Inc.*, the Ninth Circuit found no duty to disclose financial projections where there was 'no evidence . . . that the estimates were made with . . . reasonable certainty.' 628 F.2d 1214, 1221 (9th Cir. 1980) (rule 10b-5 and § 14(e) claim for material omissions in tender offer statement) (citations omitted).

App., *infra*, 12a.

One of the purposes of the antifraud provisions of the Securities Exchange Act is "to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice." *TSC Industries*, 426 U.S. at 448. The Fourth Circuit's decision holding that corporate management is never required to disclose projections no matter how certain or reliable is contrary to the policy of full disclosure. Forecasts should be disclosed where these are "very material" or "very firm." 3 A. Bromberg, *Securities Law Fraud* ¶ 6.51(431)(3) (July 1977 Supp.) at 136.124. Where, as here, the information is both material and firm, disclosure is required.[13]

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subjectivity or bias reflected in its preparation; the degree to which the information is unique; and the availability to the investor of other more reliable sources of information. *Flynn v. Bass Brothers Enterprises, Inc.*, 744 F.2d at 988.

[13] *See also*, testimony of petitioner's expert Irwin Borowski, former Associate Director of the Enforcement Division of the Securities Exchange Commission. Joint Appendix at 577-593.

A fair, coherent and consistent national standard needs to be articulated as to when federal securities laws require disclosure of soft information. The question of the materiality of soft information arises in a wide variety of settings, including tender offers, proxy statements, mergers and acquisitions. The outcome of litigation should not depend on the choice of forum.[14]

Nor should corporations subject to securities laws be required to comply with different standards in each circuit. The proliferation of standards for the disclosure of soft information, whether asset appraisals, forecasts or projections, can only create confusion and uncertainty among those subject to the Securities Exchange Act.

The Court should grant this Petition to correct a serious legal error by the Fourth Circuit, to provide guidance to the lower courts, and to resolve a conflict between the circuits regarding the standard for disclosure of soft information.

The Solicitor General and the SEC in advising denial of writ of certiorari in *Radol* recognized that petitioner's case, then pending before the Fourth Circuit, might well prove a proper case for resolving these important issues. Brief of the United States as Amicus Curiae at 17 n.18. We believe petitioner's case, as decided, squarely raises these issues and is the appropriate vehicle for resolving the confiict among the circuits on these important issues.[15]

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[14] If this case had been litigated in the Third Circuit, the jury would have been required to determine materiality according to the *Flynn* factors discussed *supra*, n. 12. *Flynn v. Bass Brothers Enterprises, Inc.*, 744 F.2d at 988. If this case had been litigated in the Sixth Circuit, the jury would have been required to determine whether respondents knew with "substantial certainty" at the time of the tender offer that their sales would at least double. *James v. Gerber Products Co.*, 587 F.2d 324, 327 (6th Cir. 1978).

[15] Petitioner respectfully suggests that the Court may find it of assistance to request the SEC and the Solicitor General for an expression of the Government's views.

II. STRIKING THE TENDER OFFER STATEMENT FROM EVIDENCE DEPRIVED THE JURY OF AN OPPORTUNITY TO DETERMINE MATERIALITY BY WEIGHING THE "TOTAL MIX" OF INFORMATION.

Although this Court has never expressly affirmed the fraud-on-the-market theory arising under federal securities laws, six Courts of Appeals have held that there is a cause of action for fraud-on-the-market in violation of the Securities Exchange Act of 1934 and Rule 10b-5.[16]

The materiality of an omission is determined by an objective standard which requires the factfinder to examine the "total mix" of information available to shareholders in a given case. *Michaels v. Michaels*, 767 F.2d 1185, 1196 (7th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 797 (1986); *TSC Industries*, 426 U.S. at 449.

The Fourth Circuit concluded that there was no reversible error in withdrawing the Tender Offer Statement from the jury because the two page August 18, 1982, press release and the thirty-five page Tender Offer Statement were identical from an evidentiary and legal viewpoint.[17] App., *infra*, 6a n.5. Such a holding is erroneous.

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[16] Second Circuit, *Panzirer v. Wolf*, 663 F.2d 365, 368 (2d Cir. 1981), *vacated as moot sub nom., Price Waterhouse v. Panzirer*, 459 U.S. 1027 (1982); Fifth Circuit, *Shores v. Sklar*, 647 F.2d 462, 469-470 (5th Cir. 1981) (*en banc*), *cert. denied*, 459 U.S. 1102 (1983); Sixth Circuit, *Levinson v. Basic Industries, Inc.*, 786 F.2d at 751; Ninth Circuit, *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); Tenth Circuit, *T.J. Raney & Sons, Inc. v. Fort Cobb Oklahoma Irrigation Fuel Authority*, 717 F.2d 1330, 1332 (10th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984); Eleventh Circuit, *Lipton v. Documentation, Inc.*, 734 F.2d 740, 745 (11th Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985).

[17] Unable to ascertain the basis for the district court's ruling that "struck the tender offer statement from evidence and instructed

The very essence of petitioner's individual and class claims arises from the Tender Offer Statement, not from the August 18 press release, since Action's duty to disclose all material information arises from the Tender Offer Statement. The press release made no attempt to correct the omissions and misrepresentations contained in the Tender Offer Statement.

Liability for omissions and misrepresentations in the tender offer terminates only when curative information is publicly announced or otherwise effectively disseminated which in this case is the October 29 press release. Rule 13e-4(a)(2); *McFarland v. Memorex Corp.*, 96 F.R.D. 357, 364 (N.D. Cal. 1982); 3 A. Bromberg, *Securities Law Fraud* ¶ 6.11(543) (July 1977 Supp.) at 138.504.

By striking the Tender Offer Statement from evidence, the trial court rendered petitioner's claim of fraud-on-the-market incomprehensible to the triers of fact. App., *infra*, 6a n.5. The jury was prevented from weighing the total mix of information available to the market to determine if the omissions were material.

III. DENIAL OF CLASS CERTIFICATION IS IMPROPER UNDER PRINCIPLES ESTABLISHED BY THE SUPREME COURT.

The Court of Appeals affirmed the district court's order denying class certification because the issue was moot in view of affirmance on the liability issue. If the Supreme

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the jury that only the alleged omissions in the press release were actionable," the appellate court speculates that the ruling may have been based on an unstated finding that petitioner did not sell his stock in reliance on the Tender Offer Statement. App., *infra*, 6a n.5. Such speculation is plainly contradicted by the record, since as the Court of Appeals recognized, petitioner received and read the Tender Offer Statement. App., *infra*, 4a.

Court grants review, then the Court should reverse the lower courts' rulings on class certification.

The district court refused to certify the class "on the ground that the Walker claim does not have typicality with other members as a class," as required by Rule 23 of the Federal Rules of Civil Procedure. The district court made no findings of fact to support this conclusion. In a fraud-on-the-market case such a ruling is plain error. The Court of Appeals held in the alternative that such a ruling was not an abuse of discretion, but the court did not provide any elaboration of its conclusion. App., *infra*, 18a, 20a, 21a.[18]

Petitioner satisfies the typicality requirement of Rule 23 ". . . if his claims and those of the members of the class stem from a single event or are based on the same legal or remedial theory." 7A C. A. Wright, A. R. Miller and M. K. Kane, *Federal Practice and Procedure* (1986) § 1764 at 243.[19] Petitioner clearly meets this test.[20] The

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[18] Petitioner meets the numerosity, commonality, and adequacy of representation requirements of Rule 23(a) and the requirements of Rule 23(b)(3). These were not discussed by the district court.

[19] Most circuits have adopted the Wright, Miller and Kane test. *E.g.*, Second Circuit, *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981); Third Circuit, *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3rd Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 342-343 (1985); Fifth Circuit, *Gonzales v. Cassidy*, 474 F.2d 67, 71 n.7 (5th Cir. 1973); Sixth Circuit, *Senter v. General Motors*, 532 F.2d 511, 525 n.31 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Seventh Circuit, *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983); Tenth Circuit, *Penn v. San Juan Hospital*, 528 F.2d 1181, 1189 (10th Cir. 1975); Eleventh Circuit, *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983).

[20] The mere fact that petitioner dealt with a stockbroker at Dean Witter Reynolds who had previously brought his own successful suit alleging that respondents had defrauded him in connection with the July 16, 1982, tender offer cannot establish some type of imaginary unique defense which would disqualify petitioner as a class representative. Neither petitioner nor his stockbroker had any insider knowledge of respondents' alleged omissions and misrepresentations. *See*, *Panzirer v. Wolf*, 663 F.2d at 368.

denial of class certification for lack of typicality is error as a matter of law.[21] *Bazemore v. Friday*, —— U.S. ——, 106 S.Ct. 3000 (1986) (reversing same erroneous view of the typicality requirement in an employment discrimination case). *See, Eisenberg v. Gagnon*, 766 F.2d at 786-787.

If there were a factual dispute to be resolved, the district court should have conducted a full evidentiary hearing as requested by petitioner's counsel. *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (4th Cir. 1981); *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974); Joint Appendix at 194.

The public interest in enforcement of the securities laws requires reversal of the order denying class certification. As this Court stated, "aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). "Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, since the effectiveness of the securities laws may depend in large measure on the application of the class action device." *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3rd Cir.), *cert. denied*, 398 U.S. 950 (1970).

CONCLUSION

The issues raised by this Petition are of significant and far-reaching importance. The individual and corporate respondents affirmatively initiated the July 16, 1982, tender offer to Action minority shareholders, but they did not make full and fair disclosure. They now claim immunity for their conduct by virtue of the

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[21] Petitioner need not establish direct proof of subjective reliance on any particular misrepresentation or omission. *Blackie v. Barrack*, 524 F.2d at 906; *Levinson v. Basic Industries, Inc.*, 786 F.2d at 750; Note, *The Fraud-on-the-Market Theory*, 95 Harv. L. Rev. 1143 (1983).

imprimatur of the federal securities laws. This claimed exemption for privileged insiders erodes public confidence in the integrity of the securities markets.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1407

WALTER T. WALKER, III,
Appellant,

versus

ACTION INDUSTRIES, INC.; AMOS COMAY; SHOLOM D. COMAY; ERNEST S. BEREZ,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (CA 84-720)

Argued: April 10, 1986 Decided: October 1, 1986

Before WIDENER, MURNAGHAN and ERVIN, Circuit Judges.

Bradley G. McDonald (John F. Karl, Jr.; McDonald & Karl; B.G. Stephenson; Stephenson & Balthrop, Ltd.; William B. Moore; Bean, Kinney, Korman, Hylton & Moore on brief) for Appellant; Bernard Marcus (Robert L. Potter; Susan A. Gromis; Titus, Marcus & Shapira;

John S. Stump; Janis Orfe; Boothe, Prichard & Dudley on brief) for Appellees.

ERVIN, Circuit Judge:

Walter T. Walker, III, appeals the jury verdict against him on his claim for violations of § 10(b)[1] of the Securities Exchange Act of 1934 and SEC rule 10b-5[2] based on alleged material omissions in a tender offer statement and press release issued by Action Industries, Inc. (Action). Walker also appeals the district court's directed verdict on his state law claim against certain directors of Action for breach of fiduciary duty, the court's denial of his motion for class certification, various evidentiary rulings and allegedly prejudicial comments by the trial judge. We conclude that the jury was instructed properly that the corporation did not have a duty to disclose its financial projections. Thus, the jury's verdict on the rule 10b-5 claim is unimpeachable. We also conclude that Walker's other bases for challenging the judgment below do not constitute reversible error. Accordingly, we affirm.

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[1] Section 10(a) prohibits the use of any "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe," "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b) (1982).

[2] Rule 10b-5, promulgated by the SEC pursuant to § 10(b), provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or any facility of any national securities exchange,
>
> . . .
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . .

17 C.F.R. § 240.10b-5 (1985).

For convenience, Walker's claim will be referred to as a rule 10b-5 claim.

I.

On July 16, 1982, Action[3] made a tender offer to purchase 15% of its common stock at $4.00 per share until August 6. In connection with the tender offer, Action issued a tender offer statement pursuant to rule 13e-4,[4] which contained financial information on the corporation. Action's fiscal year runs from July through June. The tender offer statement disclosed audited financial statements for fiscal years 1979, 1980 and 1981. These figures revealed a net loss of $2,306,900 in fiscal 1979, net earnings of $372,900 in fiscal 1980, and net earnings of $731,200 in fiscal 1981. Because the 1982 fiscal year had just ended, audited financial statements for that year were not available. Action did disclose, however, unaudited, interim financial statements for fiscal 1982 through March 27, 1982, the end of Action's third fiscal quarter. These figures indicated a net loss of $4,014,900 as compared with net earnings of $1,037,600 for the same period in the previous year. In § 14B of the tender offer statement, Action also made disclosures entitled "Events Subsequent to March 27, 1982," which stated in part:

> The Company's fiscal year ended on June 26, 1982. Although financial statements have not yet been prepared or audited, the Company expects results from continuing operations to reflect a sales increase compared with the prior year. However, earnings from continuing operations are estimated to be somewhat

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[3] Action is primarily a housewares marketing corporation which sells promotional programs for such products to large retail chain stores. Action provides the retailers with advertising, merchandise and on-site displays.

[4] Rule 13e-4, 17 C.F.R. 240.13e-4 (1985), promulgated by the SEC pursuant to § 13(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1) (1982), establishes filing and disclosure requirements for tender offers by a "reporting company" for its own shares.

lower than last year as a result of lower gross margins on sales and higher operating expenses.

In addition to financial statements, Action regularly prepared a number of other financial reports internally. On a weekly basis, Action prepared "work projections," which recorded actual orders and identified them as "firm" or "anticipated," depending on their likelihood of cancellation. Approximately monthly, Action prepared "gross sales forecasts." These reports projected monthly and quarterly sales based on the orders reflected in the weekly work projections. Action also tracked actual financial results in weekly "flash sales reports," which showed sales for the current week, month-to-date sales and quarter-to-date sales.

As early as May 1982, Action's internal financial reports indicated substantial increases in actual orders and projected sales for the first quarter of fiscal 1983 over the same period for fiscal 1982. As the July 16 tender offer grew nearer, and the first quarter of fiscal 1983 began, subsequent internal reports indicated even more substantial increases in actual orders and projected sales, as well as increases in actual sales over the prior year. Action, however, did not disclose the projected increases in sales or the increases in actual orders and sales in the tender offer statement, which was issued approximately twenty days into its first quarter of fiscal 1983.

At the time of the tender offer, Walker owned 2000 shares of Action which he had purchased in April 1982, at $3.25 per share. Walker learned of the July 16 tender offer from his broker, and based on that information, anticipated improved prospects for the company. Then, on July 21, without actually having received or read the tender offer statement, Walker purchased an additional 1500 shares of Action at $4.00 per share. Subsequently, Walker received and read the tender offer statement.

The tender offer ended on August 6 without Walker having tendered or sold any of his shares.

On August 18, 1982, Action issued a press release regarding its year-end financial results for fiscal 1982. The press release and Action's audited financial statements, on which the press release was based, essentially confirmed the statements made in § 14B of the tender offer statement regarding the company's financial performance in fiscal 1982; sales were up but earnings were down. Between the time of the tender offer and the press release, Action's internal financial reports continued to indicate substantial increases in projected sales, and actual orders and sales, for the company's first quarter of fiscal 1983 and thereafter. As with the tender offer statement, however, Action refrained from disclosing such information in the press release. Walker read the press release and concluded that the company's prospects were not favorable. On September 21, he sold all of his Action shares on the open market at approximately $5.25 per share.

Action's stock traded as high as 7⅛ per share on October 21. Then on October 28, Action issued a press release revealing its financial results for the first quarter of fiscal 1983 ending September 25, 1982. The release and accompanying unaudited, interim financial statements showed a 75% increase in sales, and net earnings of $1,467,600 compared with a net loss of $412,500, for the same period in the previous year. The following day, on October 29, Action stock traded as high as 9⅞. By November 12, the stock reached 15¾ per share.

Subsequently, Walker brought suit against Action and three of its directors. Walker pursued a claim under rule 10b-5 alleging that defendants had a duty to disclose financial projections and actual orders and sales for fiscal 1983 in the tender offer statement and the August 18 press release. Defendants' failure to make

such disclosures, alleged Walker, constituted omissions of material facts in violation of rule 10b-5. As damages, Walker sought the difference between the price he received for his shares on September 21 and the price he would have received if he had not sold them until November 12. Based on essentially the same allegations, Walker pursued a claim against the directors for breach of fiduciary duty under Pennsylvania's common law. On his state law claim, Walker sought compensatory, as well as punitive damages.

Before trial, the district court denied Walker's motion to have the suit certified as a class action and denied Action's motion for dismissal or summary judgment. At trial, after the close of Walker's case, the court granted Action's motion for a directed verdict on Walker's breach of fiduciary duty claim. Although the court removed the tender offer statement from the case,[5] Walker's 10b-5

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[5] Walker based his 10b-5 claim on omissions in both the tender offer statement and August press release. The tender offer statement initially was conditionally admitted into evidence and discussed at trial. However, at the close of plaintiff's case, the district court struck the tender offer statement from the evidence and instructed the jury that only the alleged omissions in the press release were actionable. The exact basis of the district court's ruling is unclear. The district court stated to the jury in part: "I also ruled that once a tender offer is made by a company for its own shares, then when the tender offer expires, that the tender offer has no half life. That it is no longer an actionable piece of information after stockholders either react to it or don't react to it. In this case, Mr. Walker didn't react to it, and he then sold about six weeks after that based upon other information. And the only other information that was released by the company was [the] press release." Joint Appendix at 708. Thus, it appears that the district court may have excluded the tender offer statement because Walker did not sell his stock in reliance on the tender offer statement—a prerequisite to recovery under 10b-5—but instead sold in reliance on the press release. Regardless of the basis for the court's ruling, however, we do not find reversible error in the withdrawal of the tender offer statement from the jury. Walker's arguments regarding disclosure applied equally to the tender offer statement

claim went to the jury for a determination of whether there were material omissions in the press release. The jury returned a verdict against Walker and this appeal followed.

II.

In the context of the purchase and sale of securities, rule 10b-5 prohibits misstatements of material facts or omissions of material facts, which are necessary under the circumstances to make the statements made not misleading. *See* 17 C.F.R. § 240.10b-5. In order for there to be liability under 10b-5 for omissions or nondisclosure, however, a "duty to speak" must exist. *See Starkman v. Marathon Oil Company*, 772 F.2d 231, 238 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 1195 (1986); *Flynn v. Bass Brothers Enterprises, Inc.*, 744 F.2d 978, 984 (3d Cir. 1984). Furthermore, if such a duty exists, only omissions of material[6] facts are actionable. *See id.* In

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and the press release. Both were allegedly deficient in that they omitted financial projections, as well as actual orders and sales, regarding fiscal year 1983. Therefore, with the press release before them, the jury was able to consider fully Walker's theory that Action violated 10b-5 by failing to disclose this information. Accordingly, he was not prejudiced by the district court's ruling.

Walker argues, nevertheless, that keeping the tender offer statement from the jury precluded them from finding 10b-5 liability on alleged misstatements in the statement, as opposed to omissions, that were not contained in the press release. Again, Walker was not prejudiced. Section 14B of the tender offer statement only contained statements regarding the fourth quarter of fiscal 1982. Contrary to Walker's assertion, they did not describe Action's financial prospects for fiscal 1983. The statements regarding 1982 were accurate and not misleading, and therefore, were not actionable under 10b-5 as misstatements. Overall, we uphold the district court's ruling.

[6] In the context of Rule 14a-9, *see infra* note 7, which governs disclosure in proxy statements, the Supreme Court has defined "material" in part as follows: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in [making his decision]." *TSC Industries,*

this case, it is undisputed that defendants had a general duty to speak or disclose in connection wtih the tender offer and subsequent press release. Thus, Walker's claim presented a question of whether defendants had breached their duty to disclose, and thus violated rule 10b-5, through material omissions in the August 18 press release.

Walker challenges the jury's verdict against him on his 10b-5 claim on the basis of allegedly erroneous jury instructions. Specifically, he challenges the district court's instruction that: "There is no duty on a corporation to disclose future projections. However, it can do so voluntarily." Joint Appendix at 835. Walker argues that the district court should have instructed the jury that defendants did have a duty to disclose its financial projections for fiscal 1983. Furthermore, Walker argues that the court should have instructed that defendants had a duty to disclose actual orders and sales for the same period.

We turn first to Walker's argument that the district court should have instructed the jury that Action had a duty to disclose its financial projections. Historically, the Securities Exchange Commission (SEC) has discouraged the disclosure of financial projections and other "soft" information such as asset appraisals in proxy statements, tender offers and other disclosure documents on the ground that they were likely to mislead investors. *See South Coast Services Corp. v. Santa Ana Valley Irrigation Co.*, 669 F.2d 1265, 1271 (9th Cir. 1982); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1292-94 (2d Cir. 1973); *see also Flynn v. Bass Brothers Enterprises*, 744 F.2d at 985; *Starkman v. Marathon Oil Company*, 772 F.2d at 239-40. For example, in 1956 the SEC

Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). This definition also has been held applicable in cases arising under rule 10b-5. *See, e.g., Starkman v. Marathon Oil Company*, 772 F.2d at 238.

added a note to rule 14a-9 [7] which listed "predictions as to specific future market values, earnings or dividends" as "examples of what, depending upon particular facts and circumstances, may be misleading" in proxy statements. SEC Sec. Exch. Act Rel. No. 5276 (Jan. 30, 1956), 21 Fed. Reg. 578 (1966).

The traditional SEC position, however, encountered substantial criticism in the early 1970s. *See* T. Hazen, *The Law of Securities Regulation* at 78 (1985) (citing commentators); A. Bromberg and L. Lowenfels, *Securities Fraud and Commodities Fraud* § 6.5 (431) (3), at 136.123 (1985) (same). Then, in 1976, the SEC deleted earnings projections in the 14a-9 note from the list of potentially misleading disclosures. *See* SEC Sec. Act Rel. No. 5699 (April 23, 1976), *reprinted in* [1975-76 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,461 (1976). In 1978, the SEC also adopted rule 175, which provides a "safe harbor" for "forward-looking statements" made in good faith. *See* 17 C.F.R. § 230.175 (1985); SEC Sec. Act Rel. No. 6084 (June 25, 1979), *reprinted in* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,117 (1979) (effective 1979). Forward-looking statements are defined to include "a statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items." 17 C.F.R. § 230.175(1). Rule 175, however, does not require the disclosure of financial projections. *See Starkman v. Marathon Oil Company*, 772 F.2d at 240; *Dower v. Mosser Industries, Inc.*, 648 F.2d 183, 188 n.5 (3d Cir. 1981); *Mendell v. Greenberg*, 612 F. Supp. 1543, 1550 n.8 (S.D.N.Y. 1985); T. Hazen, *supra*, at 78 n.26. Thus, the SEC currently allows or permits disclosure of financial projections on a voluntary basis.

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[7] Rule 14a-9, 17 C.F.R. § 240.14a-9 (1985), promulgated by the SEC pursuant to § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1982), regulates disclosures in proxy statements.

The circuits which have addressed whether there is a duty to disclose financial projections, and other soft information such as asset appraisals, have reached varying results. These can be described as falling into three groups. First, the Seventh Circuit would appear to take the position that there is no duty to disclose financial projections. *See Panter v. Marshall Field & Co.*, 646 F.2d 271, 292 (7th Cir.) (no duty to disclose financial projections; rule 10b-5 and § 14(e)[8] claim for material omissions in press release designed to thwart exchange offer by another company), *cert. denied*, 454 U.S. 1092 (1981). Although the Second Circuit has not considered whether there is a duty to disclose financial projections, it has declined to recognize a duty to disclose asset appraisals. *See Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d at 1294 (rule 14a-9 claim for material omissions in proxy statement). Thus, it appears that the Second Circuit also would not impose a duty to disclose financial projections. *See Mendell v. Greenberg*, 612 F. Supp. 1543, 1550 (S.D.N.Y. 1985) (citing *Gerstle* as authority that there is no duty to disclose financial projections in the Second Circuit); *cf. Reiss v. Pan American World Airways, Inc.*, 711 F.2d 11, 14 (2d Cir. 1983) (no duty to disclose merger negotiations; rule 10b-5 claim for material omissions in press release announcing debenture call).

Second, the Third Circuit has held that "[c]ourts should ascertain the duty to disclose asset valuations and other soft information on a case by case basis." *Flynn v. Bass Brothers Enterprises, Inc.*, 744 F.2d 978, 988 (3d Cir. 1984) (rule 10b-5 and § 14(e) claim for material omissions in tender offer statement). *But see Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 265 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972) (discouraging disclosure of soft information). Whether there is duty

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[8] Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (1982), prohibits material misstatements, omissions and fraudulent practices in connection with tender offers.

to disclose soft information in a given case depends on a number of factors announced by the *Flynn* court.[9] In *Flynn,* however, the court declined to apply its newly announced standard retroactively. *See* 744 F.2d at 988. Moreover, applying pre-*Flynn* standards, it found no duty to disclose the soft information at issue in that case. *See id.* at 988-91.

A third approach has been adopted by the Sixth Circuit. It has ruled that there is no duty to disclose financial projections unless they are "substantially certain."[10] *See Starkman v. Marathon Oil Company,* 772 F.2d at 241-42 (rule 10b-5 claim for material omissions in press release designed to thwart tender offer); *James v. Gerber Products Co.,* 587 F.2d 324, 327 (6th Cir. 1978) (rule 10b-5 claim for failure to disclose in connection with shareholder's sale of stock back to issuing company); *see also Radol v. Thomas,* 772 F.2d 244, 252-53 (6th Cir. 1985); *Biechele v. Cedar Point, Inc.,* 747 F.2d 209, 216 (6th Cir. 1984). While the Sixth Circuit's "substantially certain" test appears similar to the "case by case" approach announced by the Third Circuit in *Flynn,* the Sixth Circuit has rejected *Flynn* as, among other things,

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[9] The factors a court must consider in making such a determination are: the facts upon which the information is based; the qualifications of those who prepared or compiled it; the purpose for which the information was originally intended; its relevance to the stockholders' impending decision; the degree of subjectivity or bias reflected in its preparation; the degree to which the information is unique; and the availability to the investor of other more reliable sources of information.

Flynn, 744 F.2d at 988.

[10] The Sixth Circuit's decision in *Levinson v. Basic, Inc.,* 786 F.2d 741 (6th Cir. 1986), is not to the contrary. That case involved the disclosure of merger negotiations rather than financial projections or soft information, and thus, is distinguishable. Moreover, the court imposed a duty to disclose the negotiations primarily because the corporation had denied having engaged in them in a statement explaining heavy trading activity in their stock. *Id.* at 746-47.

"uncertain and unpredictable." *Starkman*, 772 F.2d at 242. It should also be noted that the Sixth Circuit in applying its "substantially certain" test, has yet to impose a duty to disclose financial projections in any case.

The Ninth Circuit appears properly categorized with the Sixth. In *Vaughn v. Teledyne, Inc.*, the Ninth Circuit found no duty to disclose financial projections where there was "no evidence . . . that the estimates were made with . . . reasonable certainty." 628 F.2d 1214, 1221 (9th Cir. 1980) (rule 10b-5 and § 14(e) claim for material omissions in tender offer statement); *see also South Coast Services Corp. v. Santa Ana Valley Irrigation Co.*, 669 F.2d 1265, 1272 (9th Cir. 1982) (no duty to disclose "subjective" asset appraisals; rule 14a-9 claim for material omissions in proxy statement).

The Fourth Circuit has not had the occasion to consider the issue of whether there is a duty to disclose financial projections. Walker argues that our decision in *Lockspeiser v. Western Maryland Company*, 768 F.2d 558 (4th Cir. 1985), controls this case. In *Lockspeiser*, the plaintiff alleged that the corporation violated rule 10b-5 and § 14(a) by omitting material facts regarding coal and timber reserves in a merger notice accompanied by a proxy statement. We reversed the district court, which had dismissed in part because the omissions were not material as a matter of law, and remanded for a determination of materiality. However, we distinguished that case from cases which involve financial projections or asset valuations. 768 F.2d at 561. Accordingly, *Lockspeiser* is not controlling here. Now faced with a case that involves financial projections, we conclude that under the circumstances of this case Action had no duty to disclose its financial projections in the August 18 press release, for the reasons that follow.[11]

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[11] We do not specifically adopt any of the various positions held by the other circuits regarding whether a duty exists to disclose financial projections.

First, we note that Action made disclosures regarding its tender offer pursuant to rule 13e-4, which governs disclosures in the context of a corporation's tender offer for its own stock. Rule 13e-4 and its accompanying schedule 13E-4, 17 C.F.R. § 240.13e-101 (1985), require that certain information be disclosed. That information includes audited financial statements for the company's two most recent fiscal years and unaudited financial statements for the company's most recent quarter. *See id.* at Item 7 (1) and (2). There is no requirement under these regulations that financial projections be disclosed. Thus, the SEC has declined to impose expressly a duty to disclose such information in the context of 13e-4 tender offer statements. It follows that there was a similar absence of any express duty to disclose financial projections in the subsequent press release.

Second, the SEC has not imposed a duty to disclose financial projections in disclosure documents generally. As already noted, financial projections were discouraged by the SEC for approximately twenty years. Now, such disclosures are allowed or permitted. The transition from nondisclosure to permissive disclosure was heralded primarily by the SEC's modification of its regulations such as the adoption of voluntary disclosure provisions in rule 175. We perceive the current SEC regulatory environment to be an experimental stage regarding financial projection disclosures. Respecting these evolutionary processes, we believe that a further transition, from permissive disclosure to required disclosure, should be occasioned by congressional or SEC adoption of more stringent disclosure requirements for financial projections, rather than by the courts.

Third, we are reluctant to recognize a duty to disclose financial projections in this case because of their uncertainty and their potential to mislead investors. Walker would have us impose a duty on Action to disclose its "gross sales forecasts," which projected monthly and

quarterly sales. On May 20, 1982, the projections indicated a 30% increase in sales, based on firm orders, for the first quarter of fiscal 1983 compared with the previous year's first quarter. Projections dated June 17 indicated a 95% increase. On July 15 they indicated a 109% increase and on August 6, 129%. Clearly, the projections were changing constantly, with each new one rendering the last incorrect. A disclosure of the May or June projections would have grossly understated subsequent projections. Furthermore, the projections failed to reflect accurately actual sales. As the first quarter of fiscal 1983 progressed, Action's "flash sales reports" showed a quarter-to-date sales increase over the first quarter of fiscal 1982 of 166% on July 3. By July 17, that figure had dropped precipitously to 42%, but by August 7 it had jumped to 134%. Most importantly, the quarter ended with an actual sales increase of 75% compared with over 129% projected. Net income, however, increased tenfold, a performance hardly forewarned by the projections. Because of the evident uncertainty and misleading nature of the projections, we deem it unwise to require their disclosure. Indeed, in light of the disparity between actual and projected sales, we wonder whether Walker also would have sued had the disclosures been made, alleging that the projections were overly optimistic. *See Panter*, 646 F.2d at 291 (rule 10b-5 and § 14(e) claim for material omissions in press release which allegedly projected the company's prospects as too "rosy.")

Finally, we believe that the projection disclosures sought by Walker are impractical. Action made its "gross sales forecasts" at least monthly and sometimes more frequently. Also, as described above, each forecast was substantially different. Because of the frequency and volatility of these projections, the imposition of a duty to disclose them would have required virtually constant statements by Action in order not to mislead investors. Under these circumstances, we deem the projection dis-

closures urged by Walker to be impractical, if not unreasonable.

For all of these reasons, we conclude that defendants did not have a duty to disclose Action's financial projections.[12] Therefore, the district court's instruction that "[t]here is no duty on a corporation to disclose future projections" is not reversible error in this case. We do not hold that there is no duty to disclose financial projections under any circumstances. To that extent, the district court's instruction arguably was error. However, any error was harmless because Action had no such duty under the circumstances of this case. We also note that our holding is not intended to discourage disclosures of financial projections. Indeed, we fully support voluntary disclosure as contemplated by rule 175. Of course, it would appear prudent to release only those projections that are reasonably certain. *See Panter*, 646 F.2d at 292; *Vaughn*, 628 F.2d at 1221. Furthermore, if a company undertakes projection disclosures, it must make the full disclosures necessary to avoid making the statements misleading. *See id.*

We now consider Walker's argument that the district court should have instructed the jury that defendants had a duty to disclose Action's actual orders and sales for fiscal 1983 in the press release. Walker argues that Action's actual orders and sales were not financial projections or soft information, but rather, they were hard facts. Of course, it is his position that there was a duty to disclose the projections, as well as these facts. The distinction made by Walker, however, also implies the argument that even if there was no duty to disclose the projections, there was a duty to disclose facts, such as the actual orders and sales. On one hand, the distinction

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[12] Stated another way, as a matter of law, defendants' failure to disclose the financial projections was not an omission of material facts, which were necessary under the circumstances to make the statements made not misleading.

arguably has merit. Actual orders and sales clearly are certain, in contrast to the projections. On the other hand, disclosure of the orders and sales in this case envoke the problems of misleading investors and impracticality described above in connection with the projections. Under the circumstances of this case, we need not decide the question of whether defendants had a duty to disclose the actual orders and sales in order to reach our conclusion that the district court did not err in failing to give the instructions now urged by Walker.[13]

Walker did not request an instruction at trial on the duty to disclose actual orders and sales. He thus waived his right to challenge on appeal the district court's failure to give such an instruction. *See Cowen v. Fulton,* 407 F.2d 93, 94 (4th Cir. 1969); *Harmsen v. Smith,* 693 F.2d 932, 939 (9th Cir. 1982), *cert. denied,* 464 U.S. 822 (1983); 9 C. Wright and A. Miller, *Federal Practice and Procedure* § 2552, at 624 (1971). Also, the district court did not preclude the jury from considering Walker's theory that defendants' failure to disclose the orders and sales constituted material omissions in violation of rule 10b-5. That is, the district court did not instruct the jury that there was *no* duty to make such disclosures, even though that instruction was requested by defendants. *See* Joint Appendix at 843. Indeed, Walker in effect argued to the jury that the orders and sales were not projections, but instead were facts, were material, and thus, were required to be disclosed. Joint Appendix 801-806. We, therefore, can find no prejudice to Walker's case from the absence of the instruction. Overall, the jury had a full opportunity to decide in favor of Walker on this theory, but they found against him. Accordingly, we conclude that the district court's failure to give an

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[13] The Third Circuit's decision in *Rothberg v. Rosenbloom,* 771 F.2d 818 (3d Cir. 1985), is not pertinent to this issue. That case, which found a duty to disclose actual orders, involved insider trading, unlike the circumstances of this case. *See generally* T. Hazen, *supra,* § 13.9 (discussing insider trading).

instruction regarding actual orders and sales was not error. Therefore, the verdict must stand. Our holding is narrow. We do not reach the question of whether there was a duty to disclose the actual orders and sales in this case or, if the district court had been requested to give such an instruction, whether its failure to do so would have been error. We only hold that it was not error for the district court to fail to give such an instruction under the circumstances of this case, in light of Walker's failure to request the instruction and the jury's opportunity to consider fully Walker's theory of recovery.

III.

Walker also challenges the district court's directed verdict on his state law claim. Under that claim, Walker had maintained that the defendant directors owed a fiduciary duty to him as a shareholder pursuant to Pennsylvania's common law.[14] He further alleged that the directors had breached that duty by omitting material facts from certain disclosure documents as described earlier. The rationale for the court's directed verdict is not entirely clear. It appears that the court rejected Walker's position that the directors owed the shareholders a fiduciary duty under Pennsylvania law, believing that such a relationship existed only between the directors and the corporation. *See* Joint Appendix at 675-705. We conclude that under Pennsylvania law directors do owe a fiduciary duty to shareholders. *See Higgins v. Shenango Pottery Company*, 256 F.2d 504, 507-08 (3d Cir. 1958) (citing *Bailey v. Jacobs*, 325 Pa. 187, 189 A. 320 (1937)); 8A Pennsylvania Law Encyclopedia § 264, at 368 (1971). Nevertheless, we uphold the directed verdict.[15] Despite the existence of the fiduciary

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[14] Action is incorporated in Pennsylvania. Walker is a citizen of Virginia. The parties agree that Pennsylvania law controls Walker's state law claim.

[15] Even if the district court's reasoning is erroneous as a matter of law, reversal is not required if the court reached the right result. *See Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978).

duty, Walker has not proffered, and we have been unable to find, any Pennsylvania authority that would recognize the allegations in this case as stating a claim for breach of that duty. Accordingly, we do not find error in withdrawing the state law claim from the jury.[16]

We have also considered Walker's appeal of the district court's denial of class certification. This issue is moot because we affirm Walker's failure to prevail on the merits of his claim. Moreover, we conclude that the district court's ruling was neither clearly erroneous nor an abuse of discretion. *See Roman v. ESB, Inc.*, 550 F.2d 1343, 1349 (4th Cir. 1976) ("The determination of a district court that an action does not meet the requirements of a class action will not be disturbed unless it is clearly erroneous. And generally, unless abuse is shown, the trial court's decision on this issue is final.") (citations omitted).

Walker also seeks to overturn the district court on the basis of several evidentiary rulings. Walker argues that the court committed reversible error in requiring him to present oral summaries of lengthy depositions, rather than reading them verbatim to the jury. Furthermore, he argues that the district court erred in conditionally admitting some of his exhibits into evidence and later striking them after the close of all the evidence. We reject his arguments primarily because he has failed to direct this court to any objections below regarding these procedures. Thus, these issues were not preserved

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[16] Walker's claim for punitive damages in connection with the alleged breach of fiduciary duty, therefore, also was disallowed properly by the district court.

After the district court directed a verdict on the breach of fiduciary duty claim, Walker moved to amend his complaint under Fed. R. Civ. P. 15(b) to allege a claim for common-law fraud. After reviewing the record, we conclude that the district court did not abuse its discretion in denying the motion. *See American Hot Rod Association, Inc. v. Carrier*, 500 F.2d 1269, 1275-76 (4th Cir. 1974).

for appeal. Also, we recognize that the district court's use of such procedures was a legitimate exercise of its inherent discretionary power to ensure the orderly and expeditious administration of the trial. *Link v. Wabash Railroad Company*, 370 U.S. 626, 630-31 (1962).

Finally, Walker seeks reversal on the ground that comments from the bench prejudiced his case. At least twice during Walker's case in chief, his counsel was reprimanded harshly by the district court, in the presence of the jury, concerning counsel's manner of presentation. Although we do not condone the court's conduct, we do not find reversible error.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. 84-720-A

WALTER T. WALKER, III,
Plaintiff,

—vs—

ACTION INDUSTRIES, INC., *et al.,*
Defendants.

HEARINGS ON MOTIONS

November 16, 1984

Before: Richard L. Williams, Judge

* * * *

THE COURT: The plaintiff's motion for class certification is denied on the ground that the Walker claim does not have typicality with other members of the class. I will not burden the class by catching them up in a war that McIntire and his disciples has with Action and one that has been going on for two years. If a clean class member surfaces who doesn't have that burden, I will re-entertain the motion for class certification. But I will tell you right now that if a clean member comes along, I will carve Walker out, because I am not about to burden a class with that war, because bear in mind that after certifying the McIntire group or the McIntire interest as a subgroup in the original Action, I then decertified them as a group and called them a subclass so that they had to run the gauntlet of meeting class certification. And then I denied them class certification because they did not have numerousity. (sic)

So, with the background that I have in the case, I would do the rest of the class, if there is a class lurking around out there, such a disservice that you can't believe it.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. 84-720-A

WALTER T. WALKER, III,
Plaintiff,

—vs—

ACTION INDUSTRIES, INC., *et al.*,
Defendants.

HEARINGS ON MOTIONS

January 4, 1985

Before: Richard L. Williams, Judge

* * * *

THE COURT: Mr. Marcus, I am adhering to my prior ruling on class certification. I have gone over it fairly carefully and am satisfied that the ruling that I made then is as good as I can make in the case. And I see no reason to modify it.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. 84-720-A

WALTER T. WALKER, III,
Plaintiff,

—vs—

ACTION INDUSTRIES, INC., *et al.*,
Defendants.

VOLUME II

TRIAL TRANSCRIPT

March 26&27, 1985

Before: Richard L. Williams, Judge
And a Jury

THE COURT: * * *

* * * *

In case counsel didn't fully understand the impact of my ruling yesterday, I ruled in effect that a tender offer has no half life. You either respond to it or you don't respond to it. So, the only document that was caused to be released by the board of Action Industries, Inc., was a press release between the time that the tender offer expired and Mr. Walker disposed of his stock. Now, if there was anything omitted or any misrepresentation in that press release, that would be actionable under a 10b-5 cause of action.

So, I am directing you to curtail your own evidence to respond to the only viable thing in the case and not cover the waterfront.

* * * *

I also ruled that once a tender offer is made by a company for its own stock, that when the tender offer expires, that the tender offer has no half life. That it is no longer an actionable piece of information after stockholders either react to it or don't react to it.

In this case Mr. Walker didn't react to it, and he then sold about six weeks after that based upon other information. And the only other information that was released by the company was that press release sometime around September 10.

And to put the case in sharper focus for you, you focus on whether there was anything, any misrepresentation in that press release or any omission that the company was guilty of. And I will give you definitions and further guidance on those things later on. And then I also have taken punitive damages out of the case.

* * * *

In this case plaintiff alleges a misrepresentation and/or an omission in defendants' press release of August 18, 1982. Plaintiff alleges that the defendants omitted material facts, specifically information as to Action Industries' financial position during the first quarter of fiscal year 1983 and the changes in the company's earning and sales trends at that time.

* * * *

One who had a duty to publicly disclose a fact which has not been properly disclosed has a continuing duty to disclose it so long as it is material and remains undisclosed. He also has a duty to correct a previously made public misrepresentation or misleading statement of a material fact known to him if he knows that such a misrepresentation or misleading statement has been made, as long as the facts involved continue to be material and are not corrected in a proper public manner.

There is no duty on a corporation to disclose future projections. However, it can do so voluntarily.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 13(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1)

(e) (1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

Rule 10b-5, 17 C.F.R. § 240.10b-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Rule 13e-4, 17 C.F.R. § 240.13e-4

* * * *

(b) (1) It shall be a fraudulent, deceptive or manipulative act or practice, in connection with an issuer tender offer, for an issuer or an affiliate of such issuer, in connection with an issuer tender offer:

(i) To employ any device, scheme or artifice to defraud any person;

(ii) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(iii) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

(2) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with any issuer tender offer, it shall be unlawful for an issuer or an affiliate of such issuer to make an issuer tender offer unless:

(i) Such issuer or affiliate complies with the requirements of paragraphs (c), (d), (e) and (f) of this section; and

(ii) The issuer tender offer is not in violation of paragraph (b) (1) of this section.

* * * *

(d) (2) If any material change occurs in the information previously disclosed to security holders, the issuer or affiliate shall disclose promptly such change in the manner prescribed by paragraph (e) (2) of this section.

* * * *

(e) (2) If a material change occurs in the information published, sent or given to security holders, the issuer or affiliate shall disseminate promptly disclosure of such change in a manner reasonably calculated to inform security holder of such change.

Rule 23. Fed. R. Civ. Pro.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.